United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2627 B P/S

United States Court of Appeals

For the Second Circuit

No. 74-2627

PEERLESS MILLS, INC.,

Plaintiff-Appellant,

against

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Defendant and Third-Party Plaintiff-Appellee,

against

HERTZ, WARNER & CO., a partnership and NORMAN CARNEY, PAUL COHN, VINCENT GENNA, MARTIN GILMAN, JOEL HELD, IRVING HERTZ, LOUIS KULIKOFSKY, JAY LEYNER, MILTON LITT, CHARLES MATTHEWS, ROBERT SADLER, JAMES SADLER, ROBERT SADLIER, JAY SALUC, KENNETH SHELDON, and HENRY WARNER, general partners in Hertz, Warner & Co.,

Third-Party Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLEE

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Statutes

U.C.C. § 8-404: *Liability and Non-Liability for Registration.*

> "(1) Except as otherwise provided in any law relating to the collection of taxes, the issuer is not liable to the owner or any other person suffering loss as a result of the registration of a transfer of a security if
>
> (a) there were on or with the security the necessary indorsements (Section 8-308); and
>
> (b) the issuer had no duty to inquire into adverse claims or has discharged any such duty (Section 8-403)
>
> (2) Where an issuer has registered a transfer of a security to a person not entitled to it the issuer on demand must deliver a like security to the true owner unless

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(a) the registration was pursuant to subsection (1); or

(b) the owner is precluded from asserting any claim for registering the transfer under subsection (1) of the following section; or

(c) such delivery would result in overissue, in which case the issuer's liability is governed by Section 8-104." 10, 16

U.C.C. § 8-315: *Action Against Purchaser Based Upon Wrongful Transfer*

"(1) Any person against whom the transfer of a security is wrongful for any reason, including his incapacity, may against anyone except a bona fide purchaser reclaim possession of the security or obtain possession of any new security evidencing all or part of the same rights or have damages

(2) If the transfer is wrongful because of an unauthorized indorsement, the owner may also reclaim or obtain possession of the security or new security even from a bona fide purchaser if the ineffectiveness of the purported indorsement can be asserted against him under the provisions of this Article on unauthorized indorsements (Section 8-311)

(3) The right to obtain or reclaim possession of a security may be specifically enforced and its transfer enjoined and the security impounded pending the litigation." 11, 12, 17

U.C.C. § 8-317: *Attachment or Levy Upon Security*

"(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source

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(2) A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.'' 16

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3 Anderson, *Uniform Commercial Code,* § 8-315:4, at 776 (2d Ed.) 12

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4 Pomeroy, *Equity Jurisprudence,* § 1058b 13

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BRIEF FOR DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLEE

Preliminary Statement

The Court has before it an appeal from the judgment of the District Court, Marvin E. Frankel, *J.*, entered on November 6, 1974, which dismissed plaintiff Peerless Mills, Inc.'s ("Peerless") claims against defendant American Telephone & Telegraph Company ("AT&T") and third-party defendants Hertz, Warner & Co. ("H-W"), Irving Hertz and Henry Warner.

Peerless has raised three issues on this appeal based on three alleged claims for relief. Two of the claims are against H-W, Irving Hertz and Henry Warner and are based on alleged acts of conversion, fraud and breach of fiduciary obligations. Peerless' claim against AT&T—and the third issue on appeal—is based on allegations that AT&T breached its statutory duty of inquiry as transfer agent for its own securities. This brief states the case only as it relates to AT&T and argues only the issue presented by Peerless' appeal of that part of the judgment of the District Court which dismissed its claim against AT&T.

Counsel for Peerless have acknowledged that it must prevail against H-W before it can assert its claim against AT&T (Transcript, p. 320). If the Court decides against Peerless on the issues presented by its claims against H-W, Irving Hertz and Henry Warner, resolution of the following issue, which concerns Peerless' claim against AT&T, will be unnecessary.

Issue Presented

Having found that plaintiff Peerless was not the true owner of the securities it claimed, was the District Court correct in dismissing Peerless' claim against AT&T for 2,000 shares of AT&T common stock alleged to have been wrongfully transferred?

Statement of the Case

This action was brought by Peerless against AT&T to recover 2,000 shares of AT&T common stock. Peerless claimed it was the owner of these shares; that it placed a "stop transfer" order on them; but that AT&T wrongfully registered a transfer of these shares to third-party defendant H-W.

AT&T, which acts as its own transfer agent (40a at ¶ 4), did not deny that it transferred the securities to H-W, nor did it deny that Peerless had placed a stop transfer on them prior to the transfer.

AT&T denied liability because its transfer to H-W was not wrongful, since H-W—not Peerless—was the true owner of the securities. The securities involved were wrongfully taken from the treasury of H-W and then, without the knowledge or authority of H-W, endorsed for transfer to Peerless. AT&T simply retransferred these securities back to H-W, the rightful owner. This was conclusively established by stipulated facts in the pre-trial order and by uncontradicted evidence introduced at the trial of this action (40a-41a, at ¶¶ 8-12).

Peerless and H-W are embroiled in a controversy involving a totally different 2,000 shares of AT&T lent by the principals of Peerless (a husband and wife) to their son-in-law, Paul Cohn, and delivered by Paul Cohn to H-W as his capital contribution to that firm ("Capital Contribution Securities").* That these different 2,000 shares were not those on which Peerless later placed a "stop transfer" order is established by stipulated facts in the pre-trial order (40a, at ¶¶ 5-7).

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* AT&T named Paul Cohn as a third-party defendant in his capacity as partner of H-W. Further pleadings and the evidence at trial revealed Cohn to be the son-in-law of the principals of plaintiff Peerless and the "victim" of the alleged H-W misconduct complained of by Peerless. (Peerless Brief, pp. 5-10.)

While AT&T does not believe Peerless has a legally sufficient claim against H-W for the value of the Capital Contribution Securities, the outcome of that dispute can have no adverse effect on AT&T's position. Even if Peerless could prevail against H-W for the value of the Capital Contribution Securities, it would not be able to establish that AT&T's transfer of the securities on which a "stop transfer" order had been placed was wrongful.

The Facts

The Pleadings

Peerless' original complaint sought the return from AT&T of 2,000 shares of AT&T common stock on the alleged ground that AT&T, acting as its own transfer agent had ignored a "stop transfer" order placed by Peerless and had improperly registered a transfer of the shares to H-W, a stock brokerage partnership. Peerless alleged it was the owner of the stock at the time it placed the "stop transfer" with AT&T (4a-5a).

AT&T, in its answer, admitted the existence of the "stop transfer" and the fact of the transfer, but denied that the transfer was wrongful. It placed in issue the question whether Peerless was the true owner of the shares (7a-8a).

By third-party summons and complaint AT&T impleaded H-W and several partners of the firm as third-party defendants, alleging that H-W had represented to AT&T that it was the lawful owner of the 2,000 shares in question and that H-W had agreed to indemnify AT&T for any liability that might thereafter be imposed on AT&T as a result of its transfer of the shares to H-W.

H-W's answer admitted that AT&T received an indemnity from H-W, but denied any liability to AT&T. In a

subsequent amended answer H-W further alleged that, by reason of the terms of a loan agreement between Peerless and Paul Cohn, an alleged partner of H-W, Peerless divested itself of ownership in the AT&T stock it sought to recover; and, therefore, could not recover from AT&T.

Thereafter, Peerless served a supplemental complaint under Rule 14, F.R.C.P., asserting two additional claims directly against H-W. This new complaint alleged that H-W wrongfully obtained 2,000 shares of AT&T stock from Peerless in that Cohn was induced to become a partner—and to borrow money from Peerless with which to make a capital contribution—through alleged fraudulent misrepresentations and fraudulent non-disclosure on the part of H-W. Peerless also alleged a conversion by H-W of the shares on the theory that Cohn's partnership status was never legally consummated—a failure of consideration (9a).

H-W denied the material allegations of the Rule 14 complaint (21a).

Cohn's Capital Contribution *

When Paul Cohn became a partner of H-W he was expected to make a capital contribution of $100,000 (83a). Cohn borrowed the money for his contribution from his in-laws, who were the sole stockholders of Peerless, a holding company with assets primarily consisting of securities of various corporations (44a, at ¶ 29).

As a matter of convenience, Peerless lent Cohn securities—2,000 shares of AT&T common stock worth $100,000 (84a). The loan was accomplished through a "Securities Loan Agreement" pursuant to which Peerless (1) surrendered all rights to the securities; (2) authorized Cohn to

* This discussion is limited to those facts which bear on Peerless' claim against AT&T.

contribute them to H-W as his capital contribution and to make them available to H-W as part of the firm's assets; and (3) agreed that the shares were to be "held, pledged, sold, transferred, disposed of or otherwise dealt with" by H-W as "partnership property" (35a).

Cohn caused the securities to be delivered to H-W and they were then transferred, on November 19, 1969 out of the name of Peerless and into the name of H-W (40a, at ¶ 6; 44a, at ¶ 32).

On January 30, 1970 H-W disposed of the Capital Contribution Securities on the open market, transferring them to Cede & Co., a central clearing house organization (40a, at ¶ 8).

Placed a "Stop Transfer"

By the spring of 1970, H-W's financial prospects were not promising. The year before, the firm suffered heavy losses, as did many other brokerage houses (46a, at ¶ 44).

Cohn expressed concern about his investment in the firm to his friend and partner, Robert Sadlier, who had back-office responsibilities at H-W (95a, 96a). Together they decided that Cohn should protect his investment by securing for Cohn and Peerless a portion of the assets of H-W equal to Cohn's investment (95a, 97a).

Thus, on May 1, 1970, Sadlier, with Cohn's approval, randomly picked twenty 100-share certificates of AT&T common stock out of H-W's treasury and, without the consent, knowledge or authority of the firm, endorsed them with H-W's name and delivered them to AT&T for transfer into the name of Peerless (41a, at ¶¶ 10, 11). AT&T, relying on what appeared to be the valid endorsement of H-W, transferred the certificates out of the name of H-W into a

2,000-share certificate of AT&T stock in the name of Peerless (41a, at ¶ 10).

This clandestine transfer was, of course, not made in the furtherance of H-W's business but rather in the furtherance of the personal interests of Paul Cohn. Cohn wanted to prevent H-W from disposing of $100,000 of the firm's assets (41a, at ¶ 10).

When the new 2,000-share stock certificate—now in the name of Peerless—was returned by AT&T to H-W, Cohn placed it back in the firm's treasury instead of delivering it to Peerless. Cohn or his attorneys apparently believed that the transfer of registration to Peerless would effectively prevent H-W from negotiating the securities and that, given the circumstances of the transfer, it would be prudent to leave the stock certificates with H-W (96a).

When H-W discovered the conversion, the firm suspended Paul Cohn (100a).

The Parties' Dealings With AT&T

Cohn attempted further to secure his "lien" on H-W assets by calling AT&T and placing a "stop transfer" order on the shares (41a, at ¶ 13; 97a).

Cohn and Peerless did not inform AT&T of the true nature of the controversy between them and H-W; and, in fact, left uncorrected for some months AT&T's belief that the "stop transfer" order was placed because Peerless "lost" its securities (147a, 148a).

On September 15, 1970 Lipkin, Gusrae & Held, attorneys for H-W, presented the 2,000 share AT&T stock certificate to AT&T and requested that AT&T transfer it out of Peerless' name and back to H-W (41a, at ¶ 16).

At the same time, H-W delivered a "Letter of Correction" to AT&T which represented that H-W was the true owner of the 2,000-share certificate and that Peerless had no interest in the securities. H-W agreed to indemnify AT&T with respect to any damages AT&T might suffer by reason of the transfer back to H-W (41a, at ¶ 16).

The Letter of Correction, sometimes called an "Ironclad Agreement", is common in the brokerage business. In the course of transacting business, brokerage houses sometimes transfer stock to the wrong customer or to the wrong brokerage house. They use the Letter of Correction to facilitate retransfer of the securities (Transcript 257).

Since H-W had possession of the securities, and since, as a result of the earlier unauthorized endorsement, H-W appeared to have been the transferor to Peerless, it looked as if H-W's request for retransfer reflected nothing more than the ordinary correction situation. This impression was strengthened by the statement of Mr. Held (a Partner in Lipkin, Gusrae & Held) to AT&T that H-W's transfer to Peerless was an "error" and by his failure to inform AT&T that a dispute existed over the shares (Pltf. Exh. 14; 206a).* Thus, on September 17, 1970, since it was not informed by either of the parties that a dispute existed, AT&T registered a transfer of the securities out of Peerless' name and back to H-W (42a, at ¶ 17).

Cohn discovered the retransfer almost as soon as it occurred (143a). Apparently content to recover his investment from AT&T, rather than from H-W, he did not inform

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* Held did write another letter to AT&T on September 15 (Pltf. Exh. 15) in which he mistakenly asked for information about the unrelated Capital Contribution Securities Cohn originally transferred to Peerless. Held apparently mailed the letter to AT&T. Plaintiff offered no evidence to show that AT&T received the letter before it registered the Disputed Securities to H-W on September 17 (Transcript 261).

AT&T of his discovery until mid-November (145a), and he took no action on his alleged fraud claims against H-W. The original complaint in this action named only AT&T.

AT&T's registration of the transfer to H-W from Peerless over a "stop transfer" order was a clerical error and was not in accordance with the company's normal practice (43a, at ¶¶ 24, 25). Of course, the failure of both Peerless and H-W to inform AT&T about the nature of their controversy—or even of the fact of the controversy—is the primary reason why AT&T relied on H-W's representations of ownership and registered the transfer.

ARGUMENT

AT&T is Not Liable to Peerless on Account of the Transfer Over the "Stop Transfer" Order.

The District Court ruled that its decision against Peerless on its claims against H-W for the value of the Capital Contribution Securities entailed the defeat of Peerless' claim against AT&T. In addition, the District Court found that Peerless was not the owner of the shares on which the "stop transfer" order was placed and that AT&T's transfer of these shares back to H-W was proper (71a).

Peerless argues here, as it did below, that since it had a claim against H-W in connection with the 2,000 shares of AT&T it contributed as capital to the firm, it had the right to cause the unauthorized endorsement and transfer to it of an equivalent number of unrelated AT&T shares owned by H-W. The District Court flatly rejected this argument:

> "Moreover, as the record makes clear, the certificate in the name of Peerless, to which the 'stop trans-

> fer' order related, had been placed in that name by an act of blatant lawlessness. There was no justification for this form of 'self-help,' which verged at least close to criminality. Far from being the 'rightful owner' of the shares, as it styles itself, Peerless had no semblance of a legitimate interest in them. Since the transfer back to Hertz, Warner was not 'to a person not entitled to it', and since Peerless was not at any material time 'the true owner' of the certificate or the shares it represented, *see* Uniform Commercial Code § 8-404, AT&T cannot be held for the loss [Peerless] incurred from the loan to their son-in-law'' (71a) [footnote omitted].

Peerless' argument should fare no better in this Court.

A. Peerless Cannot Show It Was the "True Owner" of the Securities on Which It Placed a "Stop Transfer"

Peerless' rights against AT&T are governed by the Uniform Commercial Code, § 8-404. This section provides, in effect, that the transfer agent who transfers over a ''stop transfer'' is liable only to the ''true owner'' of the securities and only if the securities were transferred to a person ''not entitled'' to them.

Subsection (1) of § 8-404 exempts the issuer from liability to the owner even where the transfer is to one not entitled to the security if (a) the security is properly indorsed and (b) the issuer has no duty, or has discharged any duty, to inquire into adverse claims (e.g., a ''stop transfer''). Subsection (2) provides in relevant part as follows:

> ''(2) Where an issuer has registered a transfer of a security to a person not entitled to it the issuer on demand must deliver a like security to the true owner unless

(a) the registration was pursuant to subsection (1);

* * * ,,

The point is, of course, that the transfer agent is not liable simply for transferring over a "stop transfer". Once in receipt of a notice of adverse claim such as a "stop transfer", the agent is liable only to the true owner of the securities and only if it transfers the securities to one not entitled to them. *Lanning* v. *Poulsbo Rural Telephone Association,* 507 P.2d 1218 (Wash. App. 1973); *Van Schaick* v. *National City Bank,* 245 A.D. 525 (1st Dept. 1935), aff'd, 271 N.Y. 570 (1936).

1. *Peerless Had no Right to Reclaim Securities from H-W; Its Only Remedy is a Claim for Damages*

Peerless predicates its claim against AT&T on its alleged "continued ownership" of the Capital Contribution Securities or an equivalent 2,000 shares of AT&T common stock (Peerless Brief, p. 44). The flaw in this premise, however, is that Peerless lost whatever rights it may have had to reclaim these securities in January of 1970 when the Capital Contribution Securities were sold by H-W on the open market. Its only remedy against H-W was damages.

Section 8-315 of the Uniform Commercial Code provides a former owner with the right to reclaim securities wrongfully obtained from him only when he can reclaim the *same* security or trace it to a new security issued upon registration of transfer of the original.* The former owner may

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* Although "new security" is not defined in the Code, the official comment to the section indicates that it refers to a new security issued upon registration of transfer of the original security. This would be consistent with the general rule that where property wrongfully obtained cannot be traced into any other property, the former

not reclaim the securities from a bona fide purchaser where the former owner is not claiming an unauthorized endorsement. Section 8-315 provides, in pertinent part, as follows:

> "(1) Any person against whom the transfer of a security is wrongful for any reason, including his incapacity, may against anyone except a bona fide purchaser reclaim possession of the security or obtain possession of any new security evidencing all or part of the same rights or have damages.
>
> * * *
>
> (3) The right to obtain or reclaim possession of a security may be specifically enforced and its transfer enjoined and the security impounded pending the litigation." U.C.C. § 8-315.

Since the Capital Contribution Securities formerly owned by Peerless were sold on the open market in 1970 and can no longer be traced to any new security, Peerless cannot assert any claim of ownership over these securities and is limited to a claim against H-W for damages.

The constructive trust decisions relied on by Peerless do not enlarge the rights it has under Section 8-315, which, as the Official Comment states, is merely a continuation of the general rule. H-W, if it did wrongfully obtain the Capital Contribution Securities, may have held them for

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owner has only a personal claim and cannot impress a trust on equivalent property. Official Comment (1) to the section explains:

> "The general rule permitting an owner to reclaim possession of a security wrongfully transferred is here continued. An exception is made, as in the prior law, in favor of bona fide purchasers. Where the transfer is based upon a forged or unauthorized indorsement the exception operates in favor only of a bona fide purchaser who has received a new security upon registration of transfer."

See also 3 Anderson, Uniform Commercial Code § 8-315:4, at 776 (2d edition).

Peerless as constructive trustee; however, its sale of these securities on the open market destroyed any right Peerless may have had to reclaim them. We have not found—and Peerless does not cite—any case which allows the former owner of securities wrongfully taken to impress a trust on those securities when they have reached the hands of a bona fide purchaser. *See Cherno* v. *Dutch American Mercantile Corp.*, 353 F.2d 147 (2d Cir. 1965).

Nor has Peerless offered any support for its argument that it can impress a trust on unrelated but equivalent securities, even though its own shares were sold on the open market and cannot be traced. The Restatement of Restitution, § 215 flatly contradicts this proposition, as follows:

> "(1) Except as stated in Subsection 2, where a person wrongfully disposes of the property of another but the property cannot be traced into any product, the other has merely a personal claim against the wrongdoer and cannot enforce a constructive trust or lien upon any part of the wrongdoer's property." *

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* Subsection 2 of § 215, the exception to the general rule set forth in Subsection 1, states as follows:

> "(2) Where a broker wrongfully disposes of the securities of a customer, the customer is entitled to claim in substitution therefor securities of the same issue owned by the broker."

The exception affords a customer who has deposited his securities with his broker a certain degree of protection over general creditors and thereby encourages a customer to entrust his broker with custody of his securities, furthering the goal of efficient functioning of the securities marketplace. Restatement of Restitution, § 215; 4 Pomeroy, Equity Jurisprudence, § 1058b; *National Sur. Corp.* v. *Silver*, 23 A.D. 2d 308, 400 (1st Dept. 1965).

This case obviously does not present a broker-customer relationship and Peerless and Cohn are not entitled to the protection the exception offers.

2. *Peerless Cannot Claim Ownership of the Securities It Obtained Through Cohn's Wrongful Transfer*

Peerless obviously cannot show that it is still the rightful owner of the Capital Contribution Securities which were sold years ago on the open market. Nor can it demonstrate that its claims against H-W give it a right to reclaim equivalent securities from H-W. Yet its claim against AT&T rests not merely on a right to reclaim an unrelated but equivalent 2,000 shares of AT&T stock from H-W, but on a claim of ownership to a particular 2,000 shares of AT&T stock—those shares which were wrongfully taken from H-W and then registered in Peerless' name.

Peerless' fundamental problem is that its claim against AT&T is built on Cohn's conversion of H-W's securities. Even if Peerless could have claimed a right to an equivalent 2,000 shares from H-W's holdings, it could not have claimed an ownership right to a particular 2,000 shares until and unless H-W properly endorsed those shares for transfer to Peerless.

Cohn's unauthorized transfer of the 2,000 shares of AT&T clearly was wrongful. The securities belonged to H-W. Prior to May 1, 1970 these securities were registered in H-W's name and were part of the firm's working assets (40a, at ¶8). There was no relationship between these securities and Cohn's capital contribution of a year before.

A potential debtor's title to his assets is not voidable at the mere whim and fancy of a potential claimant or creditor. Peerless' contention that Cohn could rightfully take it upon himself to strip H-W of its ownership rights to securities merely because it has an alleged claim against H-W is as dangerous as it is misplaced.

Whatever vitality remains to the doctrine of self-help—and we submit there is little—it surely has no place in the field of negotiable securities. Peerless is unable to cite any authority which justifies the fraudulent or unauthorized endorsement of securities as a "peaceable" retaking. Such a rule would surely wreak havoc in an area especially vulnerable to fraudulent transfers. Anyone with access to securities would be in a peculiarly tempting position to use "self-help", especially in liquidation or bankruptcy situations where claims of prior creditors could be avoided by circumventing accepted judicial process. The situation is severely aggravated in this case because the AT&T share certificates wrongfully endorsed over to Peerless by Cohn were not the same as those originally transferred to H-W by Peerless as Cohn's capital contribution.

It has long been the rule that the existence of a debt or set-off cannot justify a conversion. In *McCarthy* v. *General Electric Co.*, 49 P.2d 993 (Oregon 1935), the court stated:

> "To hold that a creditor may go into a place of business, in the absence of the owner, take goods from the shelves, and apply the value thereof to an overdue indebtedness without the knowledge or consent of the owner, would indeed, create a dangerous precedent. We cannot sanction such a method of collection. As stated in *Northrup* v. *McGill*, 27 Mich. 234: 'No creditor, without authority or right, except such as belongs to him as creditor, can dispossess his debtor of his goods and then mitigate or defeat a recovery by showing that the property taken has, without any assent or concession of the debtor, been applied on the debt.' " 49 P.2d at 995.

See also, Wilson v. *English*, 144 S.W.2d 946 (Texas 1940).

Peerless does not allege—and cannot prove—that H-W did not have good title to the AT&T securities prior to their unauthorized transfer to Peerless. Instead, Peerless vaguely argues that it had a right to the return of any 2,000 shares of AT&T and then goes on to a claim of *ownership* of a particular 2,000 shares, resting solely on the fact that at the time of the "stop transfer", these securities were registered in its name. But such registration is not proof of ownership. *Matter of Friedman,* 184 Misc. 638 (N.Y. Co. 1945). In this case, Peerless was the registered holder only because of Cohn's wrongful taking; it obviously was not the "true owner". U.C.C. § 8-404.

B. Peerless Ignored Its Appropriate Remedies

A fatal difficulty with Peerless' claim against AT&T is that it arises only because Peerless ignored the appropriate remedies available to it and misused the "stop transfer" procedure. Since the Capital Contribution Securities were sold by H-W and were no longer traceable, Peerless could not claim ownership of either the Capital Contribution Shares or any other shares and had no right to use "self-help" to obtain possession of them. Its proper remedy was to sue H-W for damages (which it now seeks) in the amount of the value of the securities. It could have achieved its objective of securing H-W's assets pending the resolution of its lawsuit simply by obtaining a legal order of attachment and levying against securities owned by H-W. U.C.C. § 8-317.

If Peerless nevertheless believed it had a right to reclaim equivalent securities from H-W it should have attempted to enjoin transfer of H-W's AT&T stock by fol-

lowing the judicial procedure outlined in UCC § 8-315(3), quoted above. One commentator has described the section as follows:

> "When the right to recover the security itself exists, the Code declares the availability of an appropriate procedure. In such a case, the owner has a right to obtain or reclaim possession through an action for specific performance, and to protect the rights of the owner during the litigation, the security may be impounded or its transfer enjoined." 3 Anderson, Uniform Commercial Code, § 8-315:4, at 776 (2d Ed. 1971).

Peerless' extraordinary notion that the right to "reclaim" under § 8-315 translates into a right to use "self-help" and to endorse securities without authority is completely without merit and should be rejected.

The "stop transfer" procedure is not an alternative attachment device. It is a remedy for owners who might otherwise be injured by the negotiable nature of their securities. Apparently, however, Cohn felt that proper judicial procedures were too cumbersome. Instead, he expected AT&T to honor his wrongful transfer of its own securities and also to prevent a retransfer of these securities to the rightful owner. If potential claimants could prevent the transfer of securities by using the methods advanced by Peerless and Cohn, not only would legal process be subverted, but the negotiability of securities would be severely impeded.

Conclusion

Instead of pursuing what legal remedies it may have had, Peerless wrongfully obtained assets of H-W and improperly attempted to secure its hold on them by means of a "stop transfer". For this, and for all the foregoing reasons, the District Court's judgment of November 6, 1974 dismissing Peerless' claim against AT&T should be affirmed.

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Respectfully submitted,

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Service of two (2) copies of

the within Brief is hereby admitted this

11th day of March, 1975

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day of , 19

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